STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
WILLIE K. NILES,	)	
	)	Charge No.: 2005CA3687
Complainant,	)	EEOC No.: 21BA52305
	)	ALS No.: 07-397
and	)	
	)	
AUTOZONE, INC.,	)	
	)	
Respondent.	)	

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision, the Complainant's Exceptions filed thereto, and the Respondent's Response to the Complainant's Exceptions.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

IT IS HEREBY ORDERED:

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on **October 11, 2010** has become the Order of the Commission.

STATE OF ILLINOIS)
) **Entered this 13th day of July 2011**
HUMAN RIGHTS COMMISSION)

Commissioner David Chang

Commissioner Marylee V. Freeman

Commissioner Robert A. Cantone

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	)
AUTOZONE, INC.,	)
Respondent.	)

RECOMMENDED ORDER AND DECISION

This matter is before me on Respondent's motion to reconsider my previous decision partially denying its motion for summary decision. Respondent filed this motion on January 7, 2010. Complainant filed a response on February 10, 1010 and Respondent filed a reply on February 23, 2010. The parties appeared for oral argument on the motion on September 28, 2010. I took the matter under advisement.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter and is, therefore, named herein as an additional party of record.

Background

Respondent filed a motion for summary decision on July 31, 2009. The motion was granted in part and denied in part by my order of December 9, 2009. That Order is incorporated herein by reference. While I granted the motion as to Complainant's claims of discharge and denial of severance package based on race, age and gender and further granted the motion as to Complainant's claims of harassment based on race, I denied the motion as to Complainant's claims of retaliatory discharge and retaliation based on failure to offer a severance package.

It is my decision denying the motion as to the retaliation claims that Respondent seeks to have reconsidered.

CONTENTIONS OF THE PARTIES

Respondent argues that it is entitled to reconsideration as I misunderstood key facts in the record concerning the date Complainant opposed what he believed to be discriminatory conduct by Respondent, which resulted in a misapplication of relevant law. Complainant counters that my understanding of the relevant date of opposition was appropriate.

FINDINGS OF FACT

The following facts were derived from uncontested facts in the record and were not the result of credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Complainant filed Charge of Discrimination, Charge Number 2005CA3687, with the Illinois Department of Human Rights (Department) on March 10, 2005. The Department, on behalf of Complainant, filed an eight-count Complaint with the Commission on June 4, 2007, alleging that Respondent subjected Complainant to illegal discrimination based on race, age, and gender when it discharged him and denied him a severance package. The Complaint further alleged that Respondent discharged Complainant and denied him a severance package in order to retaliate against him for having filed a previous unrelated charge of discrimination with the Department, Charge Number 2004CF1882, on or around January 6, 2004.

2. Complainant amended the Complaint to add a count nine on February 1, 2008. Count nine alleged that Respondent subjected Complainant to a pattern of harassment when his supervisors began "writing Complainant up at every opportunity" because of his race.

3. Complainant is a black male, 42 years old, and was employed as a Commercial Specialist/Driver for Respondent. In this position, Complainant was responsible for management of the Commercial Program at Respondent's Store #2655.

4. Complainant's allegations as to race, age and gender discrimination and racial harassment were dismissed pursuant to Respondent's motion for summary decision by order of December 9, 2009, incorporated herein by reference.

CONCLUSIONS OF LAW

1. Complainant is an *employee* as defined by section 2-101(A) of the Act and Respondent is an *employer* as defined by section 2-101(B) of the Act.
2. This record presents no genuine issues of material fact as to Complainant's *prima facie* showing on the issue of retaliation or as to the issue of pretext.
3. Respondent is entitled to a recommended order in its favor as a matter of law.

DETERMINATION

Respondent's motion to reconsider is denied in part and granted in part. Respondent is entitled to summary decision in its favor as to Complainant's retaliation claims.

DISCUSSION

A motion to reconsider is reviewed under a well settled standard. Its purpose is to bring to the tribunal's attention, newly discovered evidence that was not available at the time of the hearing, or to advise of changes in the law or errors in the court's previous application of existing law. As a general rule, a motion to reconsider is addressed to the trial court's sound discretion. *Duresa v. Commonwealth Edison Co.*, 348 Ill.App.3d 90, 97, 807 N.E.2d 1054 (1st Dist. 2004), quoting *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill.App.3d 571, 577, 742 N.E.2d 829 (1st Dist. 2000).

Respondent argues that it is entitled to reconsideration as I misunderstood key facts in the record, which resulted in a misapplication of relevant law. Specifically, Respondent contends that I failed to recognize the correct date of Complainant's opposition to discrimination in analyzing whether Complainant established the third element of his *prima facie* case as to his

retaliation claims. Respondent further argues that I incorrectly considered Niles's affidavit as sufficient to create a genuine issue of fact as to whether its reason for discharging Complainant was pretext. I address each argument separately.

Was the October, 2004 date appropriately recognized as the actual date Complainant opposed discrimination?

In my October 9, 2009 Order, I determined that the undisputed facts in the record presented a genuine issue of fact as to whether Respondent discharged Complainant in retaliation for Complainant having filed a previous, unrelated charge of discrimination against Respondent (Charge Number 2004CF1882).

In that Order, I set out the *prima facie* elements Complainant was required to prove to establish a *prima facie* case of retaliation. Complainant was required to prove three elements: 1) that he engaged in a protected activity, 2) that Respondent took an adverse action against him, and 3) that there was a causal nexus between the protected activity and Respondent's adverse action. *Carter Coal Co. v. Human Rights Commission*, 261 Ill.App.3d 1, 633 N.E.2d 202 (5th Dist. 1994).

It is my analysis of the third element that Respondent takes issue with. The undisputed facts relevant to the third element are that Complainant filed the unrelated charge of discrimination with the Department against Respondent in January, 2004; that matter was resolved when Complainant voluntarily withdrew the charge in September, 2004; and Complainant was discharged and denied a severance package in October or November, 2004. (Complainant maintains in his Complaint that he was discharged and denied a severance package on October 17, 2004, while Respondent maintains that these adverse actions occurred around November 4, 2004. This specific disputed fact as to a two-week difference in the time of occurrence of the adverse actions has no effect on this analysis.) Respondent argues that the 10-month time span between the previous January, 2004 charge filing and the November, 2004 discharge and denial of severance package is too long a time period to create a causal nexus.

Respondent contends that I improperly considered the September, 2004 *charge withdrawal* date as the date of the protected activity. Respondent maintains that Complainant's act of voluntarily withdrawing a charge of discrimination that had been previously filed against Respondent, does not qualify as engaging in protected activity for a *prima facie* analysis. Respondent's position is that the filing date of the charge, November, 2004, is the appropriate operative date from which to analyze a causal nexus, not the withdrawal date.

Complainant points to no case law or other authority in support of his position that the date he voluntarily closed his charge of discrimination previously filed against his employer was properly considered as the operative date of opposing discrimination for a *prima facie* analysis in a retaliation context.

Respondent's argument is convincing enough to prompt a second look at the facts and relevant law. I point to the Complaint, where Complainant specifically identifies January 6, 2004 as the date he engaged in the protected activity of filing the unrelated charge of discrimination with the Department. However, in his brief in response to Respondent's motion for summary decision at page 5, Complainant identifies the September, 2004 date that he voluntarily withdrew his unrelated charge of discrimination with the Department as being the operative date he opposed discrimination for the purpose of analyzing his retaliation claims. Respondent presents the *Order of Closure* of the previous charge of discrimination as its Exhibit E attached to its motion for summary decision. The date of closure is indicated as September 20, 2004.

In support of its position, Respondent points to *Wheeler and Leibovitz,* IHRC, ALS No. 8159, October 29, 1997, where the Commission held that an eight-month delay between complainant's having complained of unfair treatment during a grievance hearing and the complainant's being subjected to several adverse actions orchestrated by her employer was too long a time span to draw an inference of retaliation. I find other case precedent helpful. In *In Re: Stokes*, IHRC, ALS No. 09-0322, Nov. 4, 2009, the complainant had filed two charges of discrimination with the Department against the employer six months before the employer placed

him on administrative leave. In *Stokes*, the Commission said that six months between the filing of the charges and the adverse act was too remote a time period to infer a causal nexus in a retaliation case. I also rely on *Mims v. State of Illinois Department of Lottery, IHRC, ALS No. 6181, Dec. 17, 1998,* where the complainant had filed a charge of discrimination with the Department against the employer in September, 1988 and was discharged in April, 1990. In *Mims,* the Commission said that a nineteen-month time period between the date of the charge filing and the adverse action was too long to create an inference of retaliation. In *Stokes* and *Mims*, the Commission used the *date the charge of discrimination was filed* with the Department as the operative date for the *prima facie* analysis based on retaliation.

However, in *Washington and Groen Division/Dover Corp.*, IHRC, ALS No. 985(L), Oct. 9, 1985, the Commission found a sufficient causal connection to infer retaliation when the complainant was discharged 4 ½ months after complainant and employer had settled the latest of three previously filed discrimination charges. In *Washington*, the administrative law judge specifically referenced the charge settlement date in determining that the date of the settlement was sufficiently close to the discharge date to conclude the existence of a causal connection. Had the administrative law judge relied on the charge filing date, the time span would have been closer to six months.

Based on this analysis, it cannot be said that the date of settlement of a discrimination charge cannot be considered the operative date of a discriminatory act. Thus, when viewing the undisputed facts in the light most favorable to Complainant, the 2-month time period between the September, 2004 previous charge withdrawal and Complainant's October-November 2004 discharge is sufficiently short to create a causal nexus sufficient to establish the third element of a *prima facie* case of retaliation. Therefore, Respondent's motion for reconsideration as to this issue is denied.

I turn now to Respondent's motion for reconsideration on the issue of pretext. After Complainant established a *prima facie* case, Respondent was required to articulate a legitimate

non-discriminatory reason for its adverse actions in discharging Complainant and failing to give him a severance package.

Respondent's articulated reason was that it discharged Complainant for job abandonment after he failed to return to work around November 4, 2004. Respondent presents a sworn statement to this effect from Willie Bush Jr., Respondent's Midwest Divisional HR Manager.

Was Niles's affidavit appropriately considered as sufficient to create a genuine issue of fact as to whether Respondent's proffered reasons for its actions were pretext?

Respondent argues that I inappropriately considered two contradictory sworn statements by Complainant in ruling that those statements created genuine issues of fact as to whether Complainant was discharged for job abandonment around November 4, 2004. Respondent points to Complainant's sworn interrogatory answer #6 in which Complainant states that he was on approved vacation leave *from October 24, 2004 through November 1, 2004 and that he was allegedly discharged on October 17, 2004* [emphasis mine]. Respondent argues that this directly contradicts Complainant's affidavit attached to his response to the motion for summary decision where Complainant avers that he took his vacation *beginning November 1, 2004 ...* [emphasis mine] and further contradicts Complainant's Exhibit C attached to his response to his motion. Complainant's Exhibit C is a purported memorandum dated October 24, 2004 from Complainant to Ray Hayes, Respondent's store manager, in which Complainant indicates he *will be on vacation from November 1-5, 2004 [emphasis mine].* Respondent argues that Complainant presents these improper contradictory statements in his attempt to muddle facts pertaining to when he was due to return to work following his vacation.

Again, Respondent's argument is meritorious. Complainant's own conflicting sworn statements cannot be used to dispute Respondent's sworn averment that Complainant was discharged around November 4, 2004 after failing to return to work. Other than these conflicting statements, Complainant fails to point to anything in the record to dispute Respondent's

averment or to explain away his own inconsistent statements. A party's inconsistent sworn statements are formal binding statements of fact, precluding a party from contradicting such factual allegations. *Charter Bank & Trust v. Edward Hines Lumber*, 233 Ill.App.3d 574, 599 N.E.2d 458 (2nd Dist. 1992), *Mutual Services, Inc. v. Ballantrae Development*, 159 Ill.App.3d 549, 510 N.E.2d 1219 (1st Dist. 1987). Moreover, Complainant points to no consistent evidence to address his allegations that he was not offered a severance package. The only evidence in the record bearing on the offering of a severance package are two affidavits from Ray Hayes, Manager for Respondent – Complainant's Exhibit A attached to his response to the motion for summary decision, dated Dec. 21, 2007, and Respondent's Exhibit S attached to its motion for summary decision, dated June 8, 2009. The facts in these affidavits are vague and directly contradict one another on the issue of whether a severance was offered; such inconsistent statements are not sufficient to create an issue of fact.

Respondent's motion to reconsider is granted as to this issue. This record presents no issues of fact as to whether Respondent's proffered reasons for discharging Complainant and not giving him a severance package are pretext.

This matter is being considered pursuant to Respondent's motion for summary decision. A summary decision is analogous to a summary judgment in the Circuit Court. *Cano v. Village of Dolton*, 250 Ill. App. 3d 130, 620 N.E.2d 1200 (1st Dist. 1993). Although Complainant is not required to prove his case to defeat the motion, he is required to present some factual basis that would arguably entitle him to a judgment under the law. *Brick v. City of Quincy*, 241 Ill. App. 3d 119, 608 N.E.2d 920, (4th Dist 1993) citing, *inter alia, West v. Deere & Co.*, 145 Ill 2d 177, 582 N.E.2d 685, 687 (1991).

This record presents no issues of fact as to Complainant's retaliation claims; therefore Respondent is entitled to summary decision on the retaliation claims.

RECOMMENDATION

Based on the foregoing, I recommend that the Complaint be dismissed with prejudice in its entirety.

HUMAN RIGHTS COMMISSION

ENTERED: October 11, 2010

BY: _____
SABRINA M. PATCH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION